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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/814,014	03/30/2004	Michael Weinberger	LOJM-0462	5570
7590 Michael Weinberger 236 West 26th Street New York, NY 10001		10/18/2007	EXAMINER TOOMER, CEPHIA D	
			ART UNIT 1797	PAPER NUMBER
			MAIL DATE 10/18/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/814,014

Applicant(s)

WEINBERGER, MICHAEL

Examiner

Cephia D. Toomer

Art Unit

1797

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on 7/25/07.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 4, 5, 9 and 10 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 4, 5, 9 and 10 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on August 5, 2007 has been entered.
2. This Office action is in response to the amendment filed July 25, 2007 in which claims 9 and 10 were amended.

### ***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the first paragraph of 35 U.S.C. 112:  

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.
4. Claims 9 and 10 and their dependents are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The original filed specification does not support the language "rigidly" as it applies to the top wall nor does the specification support "being imperforate except for" or "an imperforate vapor

restrictor". Applicant has not pointed out where in the specification this language may be found nor is it readily apparent to the examiner.

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 4, 5, 9 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Orlov (US 5,026,271).

Orlov discloses a substantially rectangular fuel container for gel or wax fuel, used in a domestic fireplace. The container comprises an elongate bottom wall, a left side wall, a right side wall, an elongate front wall and an elongate back wall, thereby defining a fuel-receiving chamber. The container also includes a top wall, which is an aperture plate, having a single aperture in the shape of an elongate slot. Further, means for regulating the size of the aperture is provided as a snuffer plate, which can be moved to open and close the aperture in the aperture plate, or top wall. The snuffer plate can be considered a "removable lid" as instantly claimed. Although mention of "vapor restrictors" is not explicitly stated, it is the examiner's position that such restrictors are provided for by the top aperture plate, since the aperture is only a slot within the plate, and the rest of the plate can be considered the restrictors, extending from each of the front, back, left and right walls. The aperture slot allows a visible flame pattern of shape

and size corresponding to the shape of the aperture to exit (col. 1, line 25-col. 2, line 40; Figure 1, 4).

Orlov differs from the claims in that he does not teach that the top wall being “rigidly” joined to the other walls. However, since Applicant has not provided a definition of the term, it is the examiner’s position Orlov suggests such a juncture because the metal of the top wall is rigid, i.e., not flexible, and touches the front, back, left and right walls.

7. Claims 4-5, 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ferrara (US 4,150,610) in view of Orlov (US 5,026,271).

Ferrara discloses a self-regulating, substantially rectangular fuel cartridge comprising an elongate bottom, front, back wall, and a left-side and right-side wall, thereby defining an elongated rectangular noncombustible fuel-receiving chamber. A lid is positioned as a top wall, which is joined to the left, right, front and back walls and extends parallel to the bottom wall, enclosing the chamber. Further, the top wall comprises an elongate rectangular vapor exit aperture of a predetermined constant size, which permits the exit of vapors from the fuel receiving chamber, thereby creating an elongate, rectangular flame pattern of predetermined size and shape corresponding to a size and shape of the exit aperture (col. 3, lines 59-68; col. 4, lines 1-40).

Examiner notes that the phrase “for a domestic fireplace” in the instant application is a statement of intended use, and does not further limit the instant claims. Applicant’s attention is drawn to MPEP 2111.02 which states that intended use statements must be evaluated to determine whether the intended use results in a

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structural difference between the claimed invention and the prior art. Only if such structural difference exists, does the recitation serve to limit the claim. If the prior art structure is capable of performing the intended use, then it meets the claim. It is the examiner's position that the intended use recited in the present claims does not result in a structural difference between the presently claimed invention and the prior art and further that the prior art structure is capable of performing the intended use. Given that Ferrara discloses a fuel cartridge as presently claimed, it is clear that the fuel cartridge of Ferrara would be capable of performing the intended use, i.e. in a domestic fireplace, presently claimed as required in the above cited portion of the MPEP.

Ferrara is silent with respect to the chamber holding gel fuel, and inclusion of a removable lid, which may open the rectangular vapor aperture.

The disclosure of Orlov in paragraph 4 above is herein incorporated by reference.

It would have been obvious to one of ordinary skill in the art at the time of invention by applicant to have combined the teachings of Ferrara and Orlov in order to utilize a gelled fuel as the fuel disclosed by Ferrara, and to incorporate a means for regulating the flame and aperture size.

Ferrara is silent with respect to the top being flat, this is merely a design choice that the skilled artisan would make in order to have a more streamlined apparatus.

8. Applicant's arguments have been fully considered but they are not persuasive.

Applicant argues that it is clear that Orlov does not teach a rigidly joined top because Orlov teaches a drawer wherein the aperture plate and snuffer plate can be pivoted away from a top of the reservoir when the drawer is pulled to a forward position.

Since Applicant has not explained what is meant by rigidly joined, the examiner takes the position that since Orlov teaches that his top contacts all walls and is made of a rigid material that he meets the limitations.

Applicant argues that Ferrara has air vents and a domed lid whereas the present invention does not. Applicant argues that the top wall of Ferrara is not rigidly joined to the remaining walls.

It is the examiner's position that the shape of the lid is a design choice. The skilled artisan recognizes that matters relating to ornamentation only which have no mechanical function cannot be relied upon to patentably distinguish the claimed invention from the prior art. Applicant's desire to have a streamlined product is merely an aesthetic design choice.

With respect to the air vents of Ferrara, Applicant claims at least one elongate, rectangular vapor exit aperture, which indicates that more than one aperture may be present in the apparatus. Applicant's choice in the geometrical design of the aperture is also an aesthetic design choice.

Applicant argues that it is clear that Ferrara does not teach a rigidly joined top.

Since Applicant has not explained what is meant by rigidly joined, the examiner takes the position that since Ferrara teaches that his top contacts all walls and is made of a rigid material that he meets the limitations.

Applicant argues that because Ferrara teaches an apparatus that is suitable for outside barbeque that such an apparatus would be unsuitable for use in a domestic fireplace.

Ferrara teaches that the rotisserie portion of the apparatus is removable thus leaving an apparatus substantially as claimed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cephia D. Toomer whose telephone number is 571-272-1126. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Glenn Caldarola can be reached on 571-272-1444. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

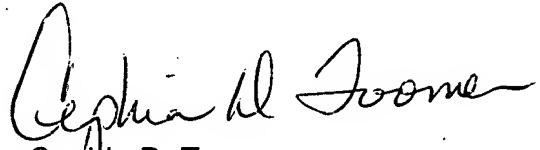
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Cephia D. Toomer  
Primary Examiner  
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